IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL R. FEOLA & SHARON L. FEOLA, husband and wife; GEORGE WILLIS; & LINDA C. SMITH, Appellants, v. DRIFTWOOD KEY CLUB, a Washington nonprofit corporation, Respondent.	No. 38627-5-II UNPUBLISHED OPINION

Van Deren, C.J. — Sharon L. and Michael R. Feola, George Willis, and Linda C. Smith, three homeowner parties in two additions of the Driftwood Key subdivision, appeal the trial court's order granting summary judgment to the Driftwood Key Club (DKC) on their quiet title and declaratory judgment action against DKC. They argue on appeal, as they asserted below, that DKC lacked authority to collect dues and levy assessments for facilities not explicitly referred to in the restrictive covenants on their properties and that DKC cannot recover under a contract implied in law. Because we hold that the covenants, articles of incorporation, and bylaws correlate to give DKC some authority to collect dues and assessments, we affirm on other grounds the trial court's order granting summary judgment to DKC against the Feolas and Willis,

whose properties lie within DKC's "jurisdiction." Because Smith's property lies outside DKC's "jurisdiction," we reverse the trial court's order granting summary judgment to DKC against Smith, remand to the trial court to enter judgment for Smith regarding future dues and assessment obligations, and remand for further proceedings on whether DKC conferred any benefit to Smith or her property that would otherwise result in her unjust enrichment.

FACTS

I. Background

In 1962, a group formed the Driftwood Key Club (DKC) to represent the Driftwood Key development in Hansville, Washington. The development is built "around a private marina in Coon Bay" and consists of the original Driftwood Key subdivision, 12 additions to the original subdivision, and the "Park Addition." Clerk's Papers (CP) at 77, 291. DKC currently owns and operates a "waterway (Coon Bay), clubhouse, swimming pool, community beach, marina slips, and launch ramp . . . not available to the general public, but only to DKC members and their family." CP at 78. Membership in DKC requires annual payments of $172 for general dues, $20 for a building and maintenance fund, $178 for a harbor/dredging fund, and $67 for legal fees.

The subdivision's plats contain covenants[1] that, in relevant part, restrict structures, govern construction, regulate the size of walls, limit "noxious" uses of the land, prohibit storage of refuse and possession of some animals, regulate signage, curtail use of the property for a business, require approval for construction and sale, and provide for enforcement of the covenants along with recovery of "damages or other dues for such violation." CP at 44. The covenants make no

[1] The covenants are virtually identical across the various subdivisions but, for purposes of this appeal, only the covenants in subdivisions five and eight apply to the parties' land.

explicit reference to DKC's articles and bylaws.[2] In turn, DKC's original articles of incorporation sets out 20 purposes for the corporation "for benefit of all property" within Driftwood Key, making "[m]embership and certificates . . . inseparably appurtenant to tracts" and "deemed to be transferred to the grantee or contract purchaser." CP at 97-98.

DKC's articles refer generally to the covenants in several paragraphs, authorizing DKC to "exercise such powers of control, interpretation, construction, consent, decision, determination, modification, amendment, cancellation, annulment and/or enforcement of covenants" and to do "all lawful things which may be advisable, proper, authorized and/or permitted to be done by said corporation under or by virtue of any restrictions, conditions, and/or covenants or laws affecting said property." CP at 96-97. In parallel with provisions in the covenants, the articles also specifically grant DKC authority to keep records of architectural projects and charges levied; regulate signage; and "enforce liens, charges, restrictions, conditions and covenants existing upon and/or created for the benefit of parcels of real property . . . to the extent that said corporation

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[2] The developer included as part of the protective covenants recorded for the last addition—the 1975 "Park Addition"—a reference to DKC's dues, articles, and bylaws in an extra page referring to contracts with purchasers. CP at 274. This extra page states:

> This contract is subject to restrictions, conditions, reservations and easements of record, and also, subject to annual maintenance dues of $2.00 per month by the Driftwood Key Club, Inc., which the purchaser herein agrees to pay. . . .
>
> Purchasers covenant and agree that the above described real estate shall be subject to the charges and assessments as provided for in, and for the purposes set forth in the Articles of Incorporation and the By-Laws of the Driftwood Key Club, Inc., a non-profit and non-stock Washington corporation and that said corporation shall have a valid first lien against the above described real estate for said charges and assessments . . . . The undersigned hereby acknowledges receipt of copies of said Articles of Incorporation and By-Laws of the Driftwood Key Club, Inc.

CP at 279. Neither party offered the original purchasers' contracts for the homeowners' properties as exhibits at trial; therefore, we do not have them on appeal.

has the legal right to enforce the same." CP at 95.

Without any explicit provision in the covenants, the articles also authorize DKC to operate "tennis courts, beaches, boat landings floats, piers, clubhouses, swimming pools," and a host of other amenities. CP at 94. The articles further grant DKC authority to set, collect, and spend charges and assessments "for any or all of the purposes for which said corporation is formed." CP at 97. The articles then specify that DKC "shall at all times hereafter be a joint and mutual association of the above named incorporators, and such other persons as may hereafter be admitted to membership in accordance with the by-laws of the corporation." CP at 98. Furthermore, "[t]he qualifications of the members of said corporation, the property, voting and other rights and privileges, and the liabilities to charges and assessments of the members, shall be as set forth in the By-Laws of the corporation." CP at 100. The articles also define the real property subject to DKC's "jurisdiction," but this "jurisdiction" does not encompass every lot in the Driftwood Key development. CP at 98.

The bylaws[3] grant DKC the "power to levy and collect assessments against its members and against the tracts owned or purchased by them for the purposes in its Articles of Incorporation and By-Laws set forth." CP at 265. The bylaws restrict membership to "owners or purchasers of one or more tracts at Driftwood Key and other persons, all as approved . . . . Ownership of a tract at Driftwood Key is not a condition precedent to membership, however, no tract may be purchased at Driftwood Key without becoming an approved member." CP at 266. Both the articles and the bylaws make "membership and certificates of membership evidencing the

[3] DKC amended its bylaws after 1981, but the version in our record on appeal is a document apparently retyped by counsel. The changes in the "newer" version are immaterial for purposes of our analysis.

same . . . inseparably appurtenant to tracts owned by the members," passing on transfer or sale. CP at 266-67. The bylaws prohibit withdrawal from membership in DKC except by transfer of the real property. The bylaws also refer to the architectural control committee and the submission process for construction and remodeling.

The original September 28, 1964, deed to property in the fifth addition now owned by Linda Smith and the July 27, 1965, deed to Michael and Sharon Feola's property in the eighth addition do not refer to DKC, its articles, or its bylaws. In contrast to these deeds, the October 20, 1964, deed conveying Lot 21 in the first addition to one of the original developers, Donald D. Fleming, states:

> This deed is subject but not limited to the following:
>
> (a) All restrictions, covenants, reservations and easements of record, and as shown on the face of the plat and to reservations by the State of Washington in conveyances of tidelands.
>
> (b) To a covenant providing as follows: PURCHASERS COVENANT and agree that the above real estate shall be subject to the charges and assessments as provide for in, and for the purposes set forth in the ARTICLES OF INCORPORATION and the BY-LAWS of the Driftwood Key Club Inc., . . . and that [DKC] shall have a valid first lien against the [property] for said charges and assessments . . . . This provision is [a] covenant running with the land and is binding on the purchasers, their heirs, successors and assigns.

CP at 283.

II. Parties

In 1989, Smith purchased Lot 69 in the fifth addition to the Driftwood Key development, subject to the covenants in the plat, and "paid her dues every year from 1989 to 2006."[4] CP at 79. Smith's real estate settlement statement listed "association dues" of $46.41 but provided no

[4] Smith's ultimate failure to pay the dues resulted in deactivation of her "magnetic card" by DKC, which presumably provided access to DKC's facilities but the record does not explain the access afforded. CP at 43.

explanation about DKC. CP at 160 (emphasis omitted). Smith's property is not contained within the boundaries of DKC's "jurisdiction" as described in its articles.

In 2002, George Willis purchased Lot 25 in the eighth addition to the Driftwood Key development, subject to the covenants in the plat and "future assessments or charges" and "unpaid assessments or charges . . . [a]s imposed by[] Driftwood Key Homeowners Association," and paid "dues up until 2005." CP at 140, 147, 79. Willis purchased his home knowing about a club with boats and swimming facilities, but he did not know about membership in or the details of DKC until he received a bill from DKC. Willis believed that paying dues gave him and his wife access to the pool and clubhouse. But according to Willis, they never used DKC's amenities other than his wife's use of "the bathroom when we went on our walks." CP at 245.

In 1998, the Feolas purchased Lot 51 in the eighth addition to the Driftwood Key development, subject to the covenants in the plat with "liability for assessments or charges as imposed by Driftwood Key Homeowners Association," and "paid their dues without interruption from 1998 through 2005." CP at 112, 78. At closing of their purchase, the Feolas paid a prorated share of the prepaid DKC dues. When they signed the closing documents, the Feolas believed that the covenants referred to in their deed authorized DKC to levy the charges they paid. Furthermore, the property listing specified that there was a moorage/dock, community

beach access, and yearly homeowner's dues of $192 to a "H.O.A."[5] CP at 129.

After 2005, the Feolas became delinquent in their payments to DKC, resulting in a lien against their property. It is not entirely clear what caused the Feola's delinquency, but it appears to be related to the DKC membership's approval of a dredging assessment. The Feolas filed an objection to the dredging project with the DKC board, Kitsap County, and the United States Army Corps of Engineers. It also appears that the Feolas sought disclosure of financial information about the dredging project and, once obtained, they sought a refund of the dredging assessment and a second membership vote on the dredging project. Later, the Feolas took issue with a sign DKC erected at the subdivision entrance that stated, "'Driftwood Key Club'" and "'private residential community.'" CP at 181 (quoting an email from the Feolas).

III. Procedure

After the Feolas failed to pay dues and assessments, DKC filed liens on the Feolas' property and the Feolas brought three unsuccessful small claims actions against DKC in district court. In the final small claims action, DKC counterclaimed against the Feolas for unpaid dues and assessments and attorney fees. The district court awarded DKC unpaid dues and assessments but denied its request for $2,174.50 in attorney fees. On December 12, 2007, DKC similarly filed a lien against the Willis's property for assessments authorized under DKC's articles and bylaws.

[5] DKC cites Wikipedia, an online user developed encyclopedic website, to support its contention that "H.O.A." stands for Home Owners Association. We note that the best citations to Wikipedia for legal practitioners are those citations that underscore its potential for inaccuracy and user abuse. *See* Cory Doctorow, *Shortcut to Omniscience*, Make, Nov. 2009, at 14, 14. *See, e.g.*, http://en.wikipedia.org/w/index.php?title=The_Colbert_Report_recurring_elements&diff=prev&oldid=66945346 (last visited Jan. 29, 2010) (showing edits by the host of a comedy news program of his show's entry in Wikipedia changing, amongst other things, his description of Oregon as "Washington's Mexico" and "the Canada of California" to merely "Idaho's Portugal"). We do not normally rely on Wikipedia citations for legal authority.

Although it threatened, DKC does not appear to have filed a lien against Smith's property.

On April 1, 2008, DKC recorded a "Notice to Members of Driftwood Key Club of Existence of Corporate Documents," referring to lots in the original plats. CP at 25 (emphasis omitted). The notice stated that these owners "are members of the Club."[6] CP at 26. On April 15, the three homeowner parties filed a summons and complaint to quiet title and for declaratory relief and they moved for summary judgment based on DKC's alleged lack of authority to levy dues and assessments under the subdivision's covenants.

DKC (1) answered raising the defenses of laches, waiver, estoppel, CR 12(b)(6), collateral estoppel, and res judicata; (2) counterclaimed for a declaratory judgment, damages, and attorney fees; and (3) moved for summary judgment on the basis that the covenants and related documents correlated, collateral estoppel and privity precluded any relief, a contract implied in law existed, and equitable estoppel applied. The trial court ruled that the covenants contained no express "language mandating membership in the Driftwood Key Club or addressing assessments to maintain common areas for the benefit of the development" but denied the homeowners' summary judgment motion. Report of Proceedings (RP) (Oct. 3, 2008) at 7. The trial court then granted DKC's summary judgment motion in part, denying relief to DKC based on correlation, collateral estoppel and privity, and equitable estoppel but granted relief based on a contract implied in law

[6] DKC provided notice that all property owners in a list of tax parcel numbers

> are members of the Club, that the Club, established in 1962, is a nonprofit corporation organized under the laws of the State of Washington; that copies of the Club's Articles of Incorporation and all amendments thereto and restatements thereof may be obtained from the Washington State Secretary of State; and that members of the Club may also obtain current copies of the Club's Articles of Incorporation and Bylaws and rules and regulations from the Club itself.

CP at 26.

because it found that the homeowners would be unjustly enriched if they did not pay the assessments.

The trial court opined that "a contract should be implied, because the properties benefit from membership, and have benefited from membership in the association with respect to the value in the lots that[i]s associated with the maintenance of the improvements, which include a community club, a pool, and a marina." RP (Oct. 3, 2008) at 13. The trial court then declined to award DKC attorneys fees under the language of either the bylaws or CR 11. The Feolas unsuccessfully moved for reconsideration. The final judgment resulted in money judgments against all three homeowners.[7]

ANALYSIS

I. Summary Judgment

We review legal questions and an order of summary judgment de novo, performing the same inquiry as the trial court. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We consider the facts and all reasonable inferences from them "in the light most favorable to the nonmoving party." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002); CR 56(c).

[7] The money judgments were against the Feolas for $545.35, against Willis for $1,073.77, and against Smith for $900.00.

II. Authority to Charge Dues and Assessments

The homeowners argue that the covenants provide only limited authority to DKC that does not include the collection of dues and assessments for purposes outside the covenants. DKC argues that its articles and bylaws correlate with the covenants in the plats and grant DKC authority to collect dues and assessments. Furthermore, DKC contends that the legislature granted it authority to collect dues, as a homeowner's association.[8] Based on the covenants, articles, and bylaws, we agree with DKC as to the Feolas and Willis but disagree as to Smith.

Interpretation of a covenant's language is a question of law. *Meresse v. Stelma*, 100 Wn. App. 857, 864, 999 P.2d 1267 (2000). A court's primary goal when interpreting a covenant is to determine the parties' intent. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994). We construe the document containing the covenants in its entirety, giving language its ordinary and common meaning. *Mountain Park Homeowners Ass'n, Inc., v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

Before a covenant can be enforced against a property owner, the party seeking enforcement must establish an equitable servitude, which requires:

> (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.

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[8] DKC's argument is circular as a homeowners' association's authority is defined by its governing documents, including:

> [T]he articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument *by which the association has the authority to exercise any of the powers provided for in this chapter* or to manage, maintain, or otherwise affect the property under its jurisdiction.

RCW 64.38.010(2) (emphasis added).

Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836 (1999). The homeowners and DKC mainly contest DKC's authority to collect dues and assessments from homeowners for activities not explicitly referred to in the covenants—i.e., the extent to which the covenants are enforceable in combination with DKC's articles and bylaws.

Washington courts have found homeowner liability for dues and assessments not fully explained in the covenants where the articles, bylaws, and covenants or deeds are "correlated."[9] *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 577, 295 P.2d 714 (1956); *Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*, 120 Wn. App. 246, 249, 84 P.3d 295 (2004).

In *Lake Limerick*, the subdivision recorded a "'declaration of restrictions'" stating:

> The owners of any Lot in said Tract or portion of said Tract shall be bound by the Articles of Incorporation and the By-Laws of the Lake Limerick Country Club. Dues and Assessments as levied in accordance with said By-Laws and Articles of Incorporation of the Lake Limerick Country Club, Inc. shall constitute a lien against the lots in the Tract described in Article I and can be foreclosed by Lake Limerick Country Club, Inc. in the manner provided by the laws of the State of Washington for the foreclosure of liens, including interest on the amount due together with reasonable attorney fees.

120 Wn. App. at 249-50 (quoting *Lake Limerick* Clerk's Papers at 127-29).

Lake Limerick's articles, filed before it recorded the declaration of restrictions, authorized Lake Limerick

> (1) "[t]o enforce assessments, liens, charges, restrictions, conditions and covenants existing upon and/or created for the benefit of parcels of real property in the plat

[9] Washington cases have not explicitly defined what it means for documents to be "correlated." As an adjective, "correlated" describes something that is "closely, systematically, or reciprocally related." Webster's Third New International Dictionary 511 (2002). The relevant definition of "correlate" as a verb includes "**4a :** to put in relation with each other **:** connect systematically **:** present or set forth so as to show relationship . . . **b :** to bring into complementary relationship with each other **:** organize so as to advance effectively a common program." Webster's Third New International Dictionary 511 (2002).

> or added to the plat of Lake Limerick Country Club, Inc."; and (2) "[t]o fix, establish, levy and collect annually such charges and/or assessments as may be necessary in the judgment of the board of trustees, to carry out any or all of the purposes for which this corporation is formed, but not in excess of the maximum from time to time fixed by the By-Laws."

Lake Limerick, 120 Wn. App. at 250 (alterations in original) (quoting *Lake Limerick* Clerk's Papers at 127-29).

In turn, Lake Limerick's bylaws authorized the homeowners' association to collect membership dues and assessments, "'[t]he aggregate amount of [which], including expenses, fees and costs reasonably imposed pursuant hereto associated with the same shall be a personal obligation of the lot owner and/or purchaser, shall run with the title to the lot, and may be sued upon directly by the corporation.'" *Lake Limerick*, 120 Wn. App. at 250-51 (quoting *Lake Limerick* Clerk's Papers at 144-45). Finally, the bylaws authorized "'the amount of any dues or assessments not paid . . . as well as all expenses, attorney fees and costs . . . shall be a lien upon the land assessed and the membership appurtenant thereto.'" *Lake Limerick*, 120 Wn. App. at 251 (quoting *Lake Limerick* Clerk's Papers at 144-45).

In *Lake Limerick*, we held that the owner, Hunt Manufactured Homes, "had *constructive* notice of the Declaration, which was recorded long before Hunt took title, and also of the articles and bylaws to which the Declaration expressly referred. The record shows a covenant running with the land, and the trial court did not err by assessing unpaid homeowners' dues against" Hunt's lot. *Lake Limerick*, 120 Wn. App. at 260 (footnote omitted).

In *Rodruck*, our Supreme Court characterized deeds and bylaws as "correlated" such that they "fulfill[ed] the requirements of a covenant or promise." 48 Wn.2d at 577-78. The specific covenant at issue included "a right of common enjoyment with the other property owners in the

streets" and a "burden of paying a share of the cost of maintaining the streets to the land enjoying the benefit." *Rodruck*, 48 Wn.2d at 576. According to the deed:

> "The said property is hereby conveyed subject to the provisions of the by-laws [of the Commission] for the purpose, among others, of taking title, in trust, to and improving and maintaining certain properties constituting easements of access (including parking strips, parking areas and bridle path) the cost thereof, including installation and maintenance of water, sewerage, gas, electric light and power and telephone, and such other service and service lines as may be deemed useful by said commission, to be assessed by it to and paid by the owners of tracts in said residential district, in the manner provided in the by-laws of said corporation. Said properties and areas are particularly described in certain deeds of conveyance from Sand Point Country Club and others to said Commission heretofore recorded and filed, respectively, in the offices of the Auditor and of the Registrar of Titles for said County, copies of which the Grantee acknowledges he has received and read; and there has been issued to the Grantee one share of stock in said corporation, which said share shall be inseparably appurtenant to the tract hereby conveyed, and said tract and each portion thereof and undivided interest therein (if at any time so comprised), shall be subject to the lien of such assessments, and the owner thereof liable therefor, as shall be levied from time to time by said Commission under and in accordance with its by-laws and any amendments thereof . . . and the Grantee . . . by the acceptance of this deed, binds himself . . . to all of the provisions, restrictions, conditions and regulations now or hereafter imposed by the by-laws of said Commission, and any amendments thereof, all of which shall constitute covenants running with the land."

Rodruck, 48 Wn.2d at 573-74 (internal quotation marks omitted).

The court noted that Rodruck, "by virtue of his purchase, became a member of the maintenance commission." *Rodruck*, 48 Wn.2d at 568. The court then stated:

> Both the original articles and bylaws and the amended articles and bylaws included . . . the maintenance and improvement of the streets, alleys, sidewalks, etc. It was for the commission as trustee . . . to determine what work was to be done in maintaining and improving the streets and what charge would be made against the members for such work. The right to demand payment of the charges levied carried with it an obligation on the part of the commission to exercise the discretion vested in it fairly and within the scope of the corporate functions outlined in its charter and bylaws.

Rodruck, 48 Wn.2d at 577. The court concluded that the deed's covenant language clearly stated

the purposes for the collection of assessments, the commission's charter designated repair and maintenance of the streets as its purpose, and the bylaws acted as a contract between the commission and its members. *Rodruck*, 48 Wn.2d at 578. The court then held that the assessments "were levied in accordance with authority vested in that body" and were "binding obligations as against appellants and the property." *Rodruck*, 48 Wn.2d at 580.

DKC's bylaws and articles clearly correlate with the covenants to vest DKC with authority to regulate signage, approve construction and renovation, enforce liens, and collect dues for violations of the covenants. The covenants set out specific restrictions on the owners' uses of land in the fifth and eighth additions: They restrict structures, govern construction, regulate the size of walls, limit "noxious" uses of the land, prohibit storage of refuse and possession of some animals, regulate signage, curtail use of the property for a business, require approval for construction and sale, and provide for enforcement of the covenants along with recovery for damages and violations. Combined, the covenants, bylaws, and articles correlate to vest DKC with authority to impose its will on Driftwood Key development owners regarding these subject matters.

Less clear is the correlation for collecting membership dues and other assessments for other purposes set out in the articles and bylaws. The Feolas' statutory warranty deed states that the land is:

> SUBJECT TO: Easement as dedicated on the face of the plat of said Addition; Kitsap County Zoning Regulations; covenants, conditions and restrictions recorded under Recording No. 852358 and amended under Auditor's File No. 8806220095 which was re-recorded under Auditor's File No. 8811020072 and amended under Recording No. 9401120022; liability for assessments or charges as imposed by Driftwood Key Homeowners Association as recorded under Recording No. 852358 and exceptions and reservations recorded under Recording Nos. 775754 and 884560.

CP at 112.

Similarly, Willis's statutory warranty deed subjects his property to:

1. Easement as dedicated on the face of the plat of said Addition;
   For: slopes, also the right to drain all streets over and across any lot or lots where water might take a natural course after the street or streets are graded.
   Affects: portion of said premises and other property.

2. The following is shown in the dedication on the face of the plat: Dimensions and uses of all lots, tracts or parcels of land embraced in this plat are subject to and shall be in conformity with Kitsap County Zoning Regulations.

3. Covenants, conditions and restrictions contained in the following instrument . . . ;
   Recording No.: 852358

a. Said instrument has been amended or modified by the following instrument;
   Recorded: June 22, 1988
   Recording No.: 8806220095

   Said instrument was re-recorded under Auditor's File No. 8811020072.

b. Said instrument has been amended or modified by the following instrument;
   Recorded: JANUARY 12, 1994
   Recording No.: 9401120022

4. Any future assessments or charges, and liability to further assessments or charges, for which a lien may have arisen (or may arise);
   As imposed by: Driftwood Key Homeowners Association
   Recording No.: 852358

5. Exception and reservations contained in Deed;
   From: Pope & Talbot, Inc.
   Recording No.: 775754 and 884560
   Records of: Kitsap County, Washington

CP at 140.

The covenants, as amended by recordings 8806220095 and 8811020072 in 1988, state

that "the transfer[]or is requested to provide the Board of Trustees of Driftwood Key Club with the name(s) and address(es) of the transferee(s)." CP at 291. The amendments also state that the "Trustees of the 'Driftwood Key Club' shall act as the 'Architectural Control Committee.'" CP at 291. The unamended portion of the covenants, as included with the original plat in Recording Nos. 852358 and 822988, states:

> 16. If the parties hereto, or any of them or their heirs, or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning real property situated in said sub-division to prosecute any proceedings at law or in equity against person or persons violating or attempting to violate any such covenants and to prevent him or them from so doing or to recover damages or other dues for such violation.

CP at 21, 44.

There is some ambiguity in the final clause of covenant 16, where it refers to "damages or other dues for such violation" because a party does not ordinarily recover dues for a violation. Dues have a more regular and periodic sense unconnected with a violation. Dues are commonly "the fee or charge required for membership, affiliation, initiation, use, subscription." Webster's Third New International Dictionary 699 (2002). This language is the only reference in the covenants to dues, there is no explicit reference to dues in the deeds, and the covenants and deeds make no reference to membership in DKC.

We read this reference to dues and mention of DKC's existence in the covenants as a broad authorization for DKC to collect dues for membership. The deed put the Feolas and Willis on notice of these covenant provisions. DKC's articles and bylaws state that a membership in DKC is "inseparably appurtenant" to land in the Driftwood Key subdivision. CP at 98, 263. This language in the articles and bylaws would not, on its own, compel membership in DKC or cause

the articles and bylaws to create an equitable servitude on each parcel. Yet when the language in the articles and bylaws is read in connection with the "dues" language and the reference to DKC in the covenants, the articles and bylaws correlate to authorize DKC to collect membership dues from owners under its "jurisdiction" for the purposes set out in its articles and bylaws.

We disagree with the trial court that these covenants in combination with the articles and bylaws do not correlate—the documents do correlate to authorize DKC to collect dues, levy assessments, and place liens on the specifically identified property within the Driftwood Key subdivision articles and bylaws. As to the Feolas and Willis, we affirm the trial court's order granting summary judgment but on other grounds: Their property is within DKC's "jurisdiction"; they received notice of an obligation to DKC in their title reports, closing statements, and deeds; they are bound by the covenants that also correlate with DKC's articles and bylaws; and the obligation is being enforced by an association representing member property owners within Driftwood Key.

But we hold that DKC's articles and bylaws do not correlate with the covenant running with Smith's land because the articles and bylaws do not vest DKC with any form of authority over her real property—her property lies outside DKC's stated "jurisdiction." Therefore, a servitude does not exist that authorizes DKC to require Smith to be a member of DKC and collect dues or assessments from her.

III. Contracts Implied in Law (Quasi Contracts)

DKC argues that, even if the documents do not correlate, a contract implied in law exists that requires Smith to pay dues. "Quasi contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties, or any consent or agreement." *Chandler v.*

Wash. Toll Bridge Auth., 17 Wn.2d 591, 600, 137 P.2d 97 (1943). These quasi contracts, or contracts implied in law are, instead, "an obligation created by law when money or property [or a service] has been placed in one person's possession under such circumstances that in equity and good conscience he ought not to retain it." *Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 37 Wn. App. 662, 670, 684 P.2d 77 (1984), *aff'd on other grounds*, 104 Wn.2d 105, 702 P.2d 459 (1985).

A. Statute of Frauds

Smith first argues that covenants not in a declaration, deed, or on the face of the subdivision plat violate the statute of frauds and are unenforceable. DKC argues that the statute of frauds does not preclude a contract implied in law. We agree with DKC that the statute of frauds does not prohibit a contract implied in law.

The statute of frauds requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed" and "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds." RCW 64.04.010, .020 (footnote omitted). But even where the statute of frauds requires a written document, a party may still be entitled to relief through a contract implied in law. *See Engler v. Tucker*, 60 Wn.2d 780, 783-84, 375 P.2d 497 (1962); *Cone v. Ariss*, 13 Wn.2d 650, 654, 126 P.2d 591 (1942); *Ernst v. Schmidt*, 66 Wash. 452, 454, 119 P. 828 (1912). In *Engler*, our Supreme Court held that, where Engler conveyed property to Tucker for a promise that Tucker would convey a house worth $2,500 to Engler, the statute of frauds would bar specific performance of the oral agreement to convey the house; but, under a theory of constructive trust,

Engler could seek specific restitution of $2,500 if he could show unjust enrichment. 60 Wn.2d at 781-84. Here the subject matter, membership in DKC, as the agreement in *Engler* to furnish some house, does not strictly require a writing. *See Cushing v. Monarch Timber Co.*, 75 Wash. 678, 685, 687-88, 135 P. 660 (1913).

B. DKC's Unjust Enrichment Argument

DKC argues that Smith would be unjustly enriched unless she is required to remain a member, paying dues and assessments. Here, we hold that DKC need not establish its authority to collect dues and assessments under covenants correlated with the articles and bylaws in order to recover under a contract implied in law; but on the record before us, there is a question of fact whether DKC enriched Smith.

To establish a contract implied in law, (1) one party must confer a benefit on another, (2) the recipient must appreciate or know of the benefit, and (3) the recipient "must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value." *Pierce County v. State*, 144 Wn. App. 783, 830, 185 P.3d 594 (2008); *see Chandler*, 17 Wn.2d at 601. "A person confers a 'benefit' upon another if he performs services beneficial to or at the request of the other, or in any way adds to his security or advantage." *Family Medical Bldg.*, 37 Wn. App. at 670. Recovery for the value of the recipient's unjust gain is measured by the cost of the benefit provided or by the increase in value to the property or interests of the recipient. *Young v. Young*, 164 Wn.2d 477, 487, 191 P.3d 1258 (2008). And the burden is on the conferring party to prove the value of the benefit conferred. *See Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982); *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 277, 135 P.3d 955 (2006).

In *Irwin Concrete, Inc. v. Sun Coast Props., Inc.*, 33 Wn. App. 190, 194, 653 P.2d 1331 (1982), a contractor's "work on the water system helped complete the shopping center thereby enabling Continental to close out its $1.5 million construction loan to Sun Coast, and . . . the water system increased the value of the 172 acres Continental now owns." We held that "it

would be unjust for Continental to receive the benefit of [Irwin Concrete's] work without paying" where Continental urged and consented to completion, Continental knew about the work, and Continental "silently acquiesced in the work when it was foreclosing its deed of trust." *Irwin Concrete*, 33 Wn. App. at 195, 194.

In its summary judgment motion, DKC alleged that "the overwhelming evidence in this case is that [the homeowners] have benefited from higher property values as a result of their residence in Driftwood Key" and "DKC property held for the enjoyment of its members includes a waterway, clubhouse, swimming pool, community beach, marina slips, and launch ramp." CP at 71. DKC argued:

> Plaintiffs cannot be heard to argue that these amenities are without worth and have no impact on their property value when their value is inherent. Surely if a resident of Driftwood Key were to sell their home, these DKC facilities would be featured prominently in the listing . . . it is simply unfair to ask the other DKC members to shoulder a disproportionate share of the financial burden of maintaining these amenities while the Plaintiffs receive a windfall in increased property values.

CP at 71.

In response to DKC's assertions in its motion, Smith argued that DKC did not demonstrate "that the existence of the Driftwood Key Club has in any way enhanced the value[] of [her] propert[y]." CP at 223. DKC cites to *Lake Limerick* for the proposition that an owner "would be unjustly enriched if it could retain [the benefit of using common facilities] without paying for it." CP at 71 (alteration in original) (quoting *Lake Limerick*, 120 Wn. App. at 261). In *Lake Limerick*, we noted that Hunt Manufactured Homes acquired a "right to enjoy certain common facilities" but, even in the absence of an exercise of that right, "Hunt was benefited because its property was worth more as a result. Hunt would be unjustly enriched if it could

retain that benefit without paying for it."[10] *Lake Limerick*, 120 Wn. App. at 261.

There is no debate that DKC operates and maintains a "waterway (Coon Bay), clubhouse, swimming pool, community beach, marina slips, and launch ramp . . . not available to the general public, but only to DKC members and their family." CP at 78. Yet beyond DKC's bare assertions that it conferred a benefit to Smith, there is no evidence in the record that the value of the homes in Driftwood Key are worth more than comparable property outside Driftwood Key by virtue of DKC membership or that Smith ever used the common facilities. *See Taylor v. Balch Land Dev. Corp.*, 6 Wn. App. 626, 631-32, 495 P.2d 1047 (1972). Furthermore, there is some evidence that, after Smith failed to pay dues, DKC restricted her access to the common facilities.[11] Thus, any benefit to Smith or Smith's property flowing from DKC amenities appears to be contingent on Smith's payment of dues, not on the land's location within the Driftwood Key subdivision.

In their cross motions, DKC offers nothing but these bare assertions that it has conferred a benefit on Smith and Smith fails in her burden to prove that, as a matter of law, there is no

[10] Although Smith urges us to require covenants to correlate with articles and bylaws before personal liability can attach under a contract implied in law, we do not read *Lake Limerick* to require that result. We do note, however, that the existence of correlated documents strengthens an argument for personal liability under a contract implied in law.

[11] Smith's failure to pay dues and assessments resulted in deactivation of her magnetic card by DKC. The record does not disclose whether the deactivation curtailed her access to DKC's amenities and benefits.

genuine issue of material fact whether DKC conferred a benefit on Smith.[12] Therefore we reverse in part the trial court's order granting summary judgment to DKC as to Smith because there is a material issue of fact about whether Smith benefited from DKC's facilities and improvements and whether a contract implied in law exists under which DKC could collect unpaid past dues and assessments from Smith.

C. Smith's Motion for Summary Judgment of No Liability to DKC

Smith argues that the trial court erred in failing to grant summary judgment in her favor and failing to declare that she owes no obligation to DKC. DKC argues that it has an implied power to collect dues and assessments associated with the pool, clubhouse, boat slips, and harbor dredging, citing out-of-state cases[13] and the Restatement (Third) of Property: Servitudes.[14] DKC

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[12] There may also be a genuine issue of material fact whether it would be unjust for Smith to retain the benefit as the record does not disclose whether the value of her lost share in DKC's assets would offset the value of any benefit DKC conferred. *See* Restatement of Restitution §§ 158-159, at 630, 634-35 (1937); *see also Ryan v. Plath*, 18 Wn.2d 839, 865, 872, 140 P.2d 968 (1943).

[13] DKC notes cases from jurisdictions applying the Restatement (Third) of Property: Servitudes to support its position, but these cases are neither grounded in nor refer to a contract implied in law or its requirement for unjust enrichment. Most of the cases explicitly refer to contracts implied in fact, which do not apply here because DKC fails to show that (1) Smith requested services, (2) DKC expected payment for the services, and (3) Smith knew or should have known DKC expected payment for the services. *Young*, 164 Wn.2d at 486.

[14] DKC points to section 6.2 comments b and d as well as section 6.5 comment b to support its arguments. Section 6.5 focuses on the mechanics of levying assessments and not the authority underlying the purposes of assessments. Restatement (Third) of Prop.: Servitudes § 6.5, at 94-95 (2000) (Restatement: Prop.). Section 6.2 concerns itself with developments "in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal." Restatement: Prop. § 6.2(1), at 75 (emphasis omitted). At bottom there must be a "declaration," which is a "recorded document or documents containing the servitudes that create and govern the common-interest community." Restatement: Prop. § 6.2(5), at 76. Where the declaration does not connect the servitudes with the association's ability to levy dues or assessments:

> An implied obligation [to contribute to the maintenance of commonly held

argues that we should allow it to levy dues and assessments in the future through an ongoing contract implied in law because it cannot accommodate voluntary members and it requires forced membership of all Driftwood Key residents in order to maintain fiscal viability.

DKC's argument seems to be that prospective, judicially ordered, compulsory membership is the only option to prevent unjust enrichment to homeowners who, like Smith, are not within the "jurisdiction" of DKC's articles. DKC identifies the following issues as grounds for us to hold Smith and all similar Driftwood Key residents prospectively liable under a contract implied in law for dues and assessments: Fluctuating demand would make "planning extremely difficult," costs could become prohibitive for facilities that other members "relied on" when they decided to purchase in Driftwood Key, the administrative burden on DKC would be onerous, DKC could not overcome voluntary compliance problems with "the possibility of free riders," and uneven enforcement by DKC would raise issues of fairness. Br. of Resp't at 33-34.

DKC raised none of these arguments to the trial court and there is no factual support in the record for any of these contentions. But even if everything DKC alleged were true, a contract implied in law is meant to prevent unjust enrichment when a party gives another person property

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> property without regard to usage] may also be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions.

Restatement: Prop. § 6.2 cmt. a at 78. These provisions, even were they wholly adopted by Washington courts, do not aid DKC in its arguments for a contract implied in law—they contemplate some explicit authorization of authority even if there is not explicit authorization to levy dues and assessments. *See* Restatement: Prop. § 6.2 cmt. e at 81. If the covenants binding Smith's property referred to management of common facilities, these Restatement provisions would implicitly authorize collection of dues—these provisions would not, however, create the authority to manage common facilities without some reference in the covenant or correlation with the articles and bylaws.

or actually renders services to another. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989). Recovery under a contract implied in law focuses on the past and accrues when the service is rendered or the property is provided—it is not a doctrine that creates an ongoing relationship because "the plaintiff cannot be a mere volunteer." *Lynch*, 113 Wn.2d at 165; *see Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467, 471, 36 P. 463 (1894); *see also* Restatement of Restitution at 8-9 (1937). DKC may be able to recover monetary damages for benefits conferred in the past—but this is a matter for the parties and the trial court to resolve on remand.

Once DKC recovers payment for any benefit conferred on Smith that would otherwise lead to her unjust enrichment, DKC may choose how it will stop conferring benefits on other individuals outside its "jurisdiction." Now that DKC is aware that Smith is not obligated to remain a DKC member, any future choice to confer a benefit will not lead to an inequitable result because there can no longer be any argument that DKC acted in accordance with a mistaken view of its governing documents—DKC may not recover in the future for unjust enrichment as "a mere volunteer." *Lynch*, 113 Wn.2d at 165; *see, e.g.*, *Pacific Mail S.S. Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 457-58 (1864).

Because DKC cannot, as a matter of law, create prospective liability between it and Smith through a contract implied in law, we reverse in part the trial court's order granting summary judgment and direct the trial court to enter judgment in favor of Smith as to future DKC dues and assessment obligations to DKC.

IV. ATTORNEY FEES

DKC requests fees and costs under RAP 14.2 through 14.4 and 18.1. DKC is only in part a prevailing party, thus we do not award it fees or costs.

Because the covenants, articles, and bylaws correlate, we affirm on other grounds the trial court's order granting summary judgment to DKC against the Feolas and Willis. We reverse the trial court's order granting summary judgment to DKC against Smith, remand to the trial court to enter judgment for Smith regarding future dues and assessment obligations, and remand for further proceedings on whether DKC conferred any past benefit to Smith that would otherwise result in her unjust enrichment if she pays no dues and assessments.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.